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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KENNETH I. DEANE,

11 Plaintiff,

12 v.

13 PACIFIC FINANCIAL GROUP INC,
14 et al.,

15 Defendants.

CASE NO. C19-722 MJP

ORDER ON MOTION FOR
TEMPORARY RESTRAINING
ORDER

16 The above-entitled Court, having received and reviewed:

- 17 1. Defendants' Motion for Temporary Restraining Order (Dkt. No. 25),
18 2. Plaintiff Kenneth I. Dean's Memorandum Opposing Defendants' Motion for
19 Temporary Restraining Order (Dkt. No. 30),
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all attached declarations and exhibits, and relevant portions of the record, rules as follows:

21 IT IS ORDERED that the motion is DENIED.
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1 **Background**

2 Defendant The Pacific Financial Group, Inc. (“TPFG”) is an investment advisory group;
3 Plaintiff was employed with the company from October 2007 until January 2019 (Plaintiff
4 actually disputes when his employment ended, but for purposes of this motion is willing to use
5 January 2019 as his end date). Plaintiff executed an Employment Agreement (“the Agreement”) with TPFG. Two of the primary provisions of the Agreement consisted of (1) Plaintiff’s
6 acknowledgment that TPFG’s confidential information “constitutes a valuable, special and
7 unique asset of [TPFG];” and (2) Plaintiff’s agreement, for a period of one year post-separation,
8 to neither solicit any TPFG client to terminate its relationship with TPFG nor induce any referral
9 sources to cease doing business or otherwise interfere with their relationship with TPFG. Dkt.
10 No. 27, Decl. of Meade, Ex. A at 5-6.

12 Following Plaintiff’s separation from TPFG, he began receiving quarterly termination
13 payments per the Agreement (Plaintiff disputes that TPFG is calculating the payments correctly
14 – it is one of the issues in this lawsuit – but that is not relevant for purposes of the TRO). He
15 became employed by Advisors Capital Management (“Advisors Capital,” “Advisors”), another
16 investment advisory company which TPFG describes as a “direct competitor.” Shortly after
17 taking his new position, Plaintiff contacted the Executive Vice President (Mills) of Kovacks
18 Securities, Inc. (“Kovacks”), an investment advisory company which utilizes TPFG’s portfolio
19 management services and programs, seeking to schedule a meeting to discuss his new position at
20 Advisors Capital. Mills referred Plaintiff to Kovacks’ business development consultant
21 (Monks). On July 18, 2019, Plaintiff met with Monks and discussed the establishment of a
22 business relationship between Advisors and Kovacks which would include the use of Advisors’
23 models on Kovacks’ platform. Dkt. No. 29, Decl. of Monks at ¶ 5. Plaintiff followed up with
24 emails after the meeting. Id., Ex. B.

1 Kovacks informed TPFPG of the contact from Plaintiff (Decl. of Meade at ¶ 7), resulting
2 in TPFPG filing a cease and desist letter with Plaintiff's attorney, who responded by assuring the
3 company that Plaintiff was aware of the constraints of the Agreement and had no intention of
4 violating them. A similar letter was sent by TPFPG to Advisors Capital.

5 Three months later, Defendant filed the instant motion, seeking:

- 6 1. A prohibition against Plaintiff "using, disclosing, copying, storing, transmitting,
7 interfering, or otherwise damaging" TPFPG's confidential and proprietary information;
- 8 2. A prohibition against Plaintiff "inducing any custodians, consultants, or referral sources
9 to cease doing business with or interfering with their relationship with TPFPG;"
- 10 3. Permission to deposit all future payments owing to Plaintiff under his employment
11 contract with the Court Registry.

12 **Discussion**

13 The parties are in agreement regarding the standard against which this request for
14 emergency equitable relief must be measured. Defendant is required to establish (1) a likelihood
15 of success on the merits, (2) that it is likely to suffer irreparable harm in the absence of the
16 requested relief, (3) that the balance of hardships tips in its favor, and (4) that the public interest
17 favors an injunction. Winter v. Natural Resources Defense Counsel, Inc., 555 U.S. 7, 20 (2008).

18 The threshold inquiry must be whether the moving party can show a likelihood of success
19 on the merits; if Defendant fails in that regard, the Court is not even required to consider the
20 other three elements of the Winter test. Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir.
21 2015).

22 Defendant has not succeeded in establishing a likelihood of success on the merits. The
23 Agreement prohibits Plaintiff, for one year following his termination, from the following:
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1 [D]irectly or indirectly [] solicit[ing] the services of any of the employees
2 or investor clients of the Employer *with the purpose of causing such*
3 *persons to terminate their employment or business relationship with the*
4 *Employer*, as the case may be, (2) caus[ing], induc[ing] or attempt[ing] to
5 cause or induce any of the Employer’s custodians, consultants, or referral
6 sources or any other business relation of Employer *to cease doing business*
7 *with Employer or in any way interfere with the relationship between*
8 *Employer and its custodians, consultants, and referral sources.*

9 Dkt. No. 31, Decl. of Deane, Ex. A (emphasis supplied).

10 While TPFG has evidence that Plaintiff contacted Kovacks (which indisputably has a
11 business relationship with Defendant), none of its evidence regarding that contact – which
12 consists solely of the declarations of Mills and Monks – even suggests that Plaintiff attempted to
13 induce Kovacks to cease doing business with TPFG or in any other way to interfere in that
14 relationship. Plaintiff submits his own testimony that Advisors and TPFG “work primarily in
15 separate areas” (with some overlap) and that he “consciously avoided any interference with
16 TPFG’s relationship.” Dkt. No. 31, Decl. of Deane at ¶ 12.

17 The Court is confident that if Defendant had *any* evidence that Plaintiff had solicited
18 Kovacks to cut its ties to TPFG, that evidence would have been produced; the company does not
19 even allege or present evidence that Plaintiff’s overtures to Kovacks “interfered” with TPFG’s
20 relationship with its client. The best Defendant can do is speculate that Plaintiff’s employment
21 with Advisors “will cause extensive damage to TPFG;” the speculation does not even include
22 what kind of damage. Decl. of Meade at ¶ 8.¹ Defendant has not made the requisite “clear
23 showing that [it] is entitled to” emergency equitable relief on the basis of a meritorious factual or
24 legal position. Winters, *supra* at 22.

¹ Meade also alleges that Plaintiff “has used, and it is inevitable that he will continue to use [confidential and proprietary information]” belonging to TPFG (Decl. of Meade at ¶ 8), but she presents no evidence in support of that allegation.

1 Although the failure to satisfy the first Winters element alone is enough to defeat
2 Defendant's motion, TPFPG's failure of proof inevitably bleeds over into its attempt to establish a
3 likelihood of irreparable damages absent the injunction. As mentioned above, there is no
4 evidence that TPFPG has suffered any actual injury (loss of income, loss of business relationships)
5 as regards Kovacks (or any other client). Of course, if the company's only injury was financial,
6 an equitable remedy would be inappropriate. But Defendant's evidence is also completely
7 lacking in any proof of damage to reputation or goodwill or any other intangible loss that might
8 better support an allegation of "irreparable" injury.

9 Further, the Court is cognizant that "[o]nce a [moving party] has been wronged, [it] is
10 entitled to injunctive relief only if [it] can show that [it] faces a 'real or immediate threat... that
11 [it] will again be wronged in a similar way.'" Munns v. Kerry, 782 F.3d 402, 411 (9th Cir.
12 2015)(citations omitted). TPFPG makes no allegations and presents no proof that Plaintiff has
13 repeated, or is planning to repeat, this conduct. And, finally, there is the fact that the allegedly
14 objectionable conduct occurred in July of this year, and Defendant waited three months before
15 moving for "emergency" relief. There is no proof here of a violation, of irreparable injury, or of
16 any emergency requiring extraordinary relief to issue.

17 **Conclusion**

18 Defendant has failed to present sufficient evidence to satisfy the requirement of
19 establishing its likelihood of success on the merits of its claim, and has additionally failed to
20 establish the likelihood of irreparable injury should its request be denied. For those reasons, its
21 request for emergency equitable relief in the form of a temporary restraining order will be
22 denied.

1 The clerk is ordered to provide copies of this order to all counsel.

2 Dated October 31, 2019.

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4 Marsha J. Pechman
5 United States Senior District Judge